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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

ALASKA COMMUNITY ACTION ON TOXICS and ALASKA CHAPTER OF THE SIERRA CLUB, Plaintiffs, vs. AURORA ENERGY SERVICES, LLC and ALASKA RAILROAD CORPORATION, Defendants.	Case No. 3:09-cv-00255-TMB **DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

Plaintiffs spend twenty-seven pages of their brief laboring to establish that coal from the Seward Terminal entered Resurrection Bay. Yet each of the discharges or emissions alleged by Plaintiffs has been regulated by the U.S. Environmental Protection Agency ("EPA") and/or the Alaska Department of Environmental Conservation ("DEC"). The Seward Terminal's Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity ("General Permit") governs coal sediment from the conveyor/shiploader and coal-laden snow, while DEC regulates dust from the Seward Terminal pursuant to federal and Alaska clean air laws.

Moreover, these regulatory efforts impose the same fundamental duty on defendants as would the Plaintiffs' preferred individual permit: best management practices to control discharges and emissions, but *no requirement for zero discharges or zero emissions*. And while the facts alleged by Plaintiffs in those twenty-seven pages are very much in dispute,[1] Plaintiffs *do not dispute* that Defendants have done everything EPA and DEC have required.

While this case turns on a Clean Water Act regulatory issue, this Court should not lose sight of the larger environmental story. Plaintiffs would have the Court believe that the Seward Terminal has turned Seward and Resurrection Bay into a town and bay covered in coal sediment and coal dust. But this is far from the case. Since taking over the operations of the facility in 2007, Defendants have implemented systematic and continuous improvements to operating procedures, equipment, and housekeeping measures to prevent coal making its way to Resurrection Bay either through air emissions or discharges to the water, and repeated DEC and EPA inspections have led these agencies to conclude that the facility is in compliance with applicable law.

Environmental issues at Seward Terminal were well under control by the time Plaintiffs arrived on the scene. By October 28, 2009, the date Plaintiffs filed their Notice of Intent to Sue, Defendants (i) already had installed control measures on coal sediment discharges exceeding what was required under the General Permit and the facility's Stormwater Plan that is an

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[1] *See* Section IV, *infra*.

enforceable component of that permit; (ii) already were subject to a DEC air enforcement action that penalized past coal dust emissions and required actions to minimize them in the future; and (iii) already had a long-standing policy prohibiting employees from plowing coal-laden snow into the Bay. It thus comes as no surprise that Plaintiffs' specific allegations skew heavily to the time period *before* the Notice of Intent.

Indeed, conditions in and around the Seward Terminal have improved so much that the Alaska Clean Harbors Advisory Committee recently certified the Seward Small Boat Harbor as an Alaska Clean Harbor.[2] That designation—made by a committee comprised of environmental groups, Alaska state environmental agencies, a statewide harbormaster organization and other members, and based on rigorous criteria—belies Plaintiffs' description of the environmental conditions not only at the Seward Small Boat Harbor,[3] but also at the entire area surrounding the Seward Terminal.

Defendants take seriously their commitment to the environment. They have obtained the necessary permits after consulting with the governing regulatory agencies, they have complied with these permits, and they have met all of their regulatory obligations. These efforts have improved conditions in and around the Seward Terminal, something about which everyone—EPA, DEC, and Plaintiffs[4]—can agree.

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[2] Supplemental Declaration of David Mayberry in Support of Defendants' Opposition to Plaintiffs' Motion for Summary Judgment ("Mayberry Decl."), Ex. A (Homer News Article).

[3] *Id.*; *See* Plaintiffs' Memorandum in Support of Motion for Summary Judgment ("Plfs' Brief") at 16-20, 22 (relying heavily on conditions at the Seward Small Boat Harbor as examples of adverse effects supposedly caused by Seward Terminal activities).

[4] *See, e.g.*, Declaration of Denise L. Ashbaugh in Support of Defendants' Motion for Summary Judgment ("Ashbaugh Decl.") (Docket # 121), Ex. LL (Apr. 27, 2010 email from Sean Lowther to Russ Maddox); *see also id.*, Ex. Z (Mar. 25, 2009 email from Alice Edwards to Russ Maddox and others); Ex. HH (ACAT Dep.) at 47:13-15; Mayberry Decl., Ex. B (Apr. 27, 2010 email from Russell Maddox to Sean Lowther) ("I do see them working hard to minimize the dust. Its [sic] gratifying to see substantial improvements after all of these years.").

STATEMENT OF FACTS

While Defendants have detailed the background of this litigation in their prior submission,[5] Plaintiffs' current motion implicates factual elements that deserve particular attention. For the Court's convenience, Defendants offer the following summary description.

The Seward Terminal and Its Regulation and Permitting Under the Clean Water Act

The Seward Terminal has operated since 1984, and its initial permit from EPA was an individual NPDES permit.[6] EPA conducted compliance inspections during the time that permit was in effect, and was well aware of the potential incidental discharges of coal and emissions of coal dust from the facility.[7]

In 1999, EPA actually *initiated* discussions about changing from an individual NPDES permit to coverage under the General Permit.[8] EPA advised that although the facility could operate under either type of permit, EPA preferred to use the General Permit.[9] In 2001, based on EPA's evaluation and preference, the facility owner obtained a General Permit.[10] EPA thereafter inspected and conducted ongoing oversight of the Seward Terminal pursuant to that permit.[11] In 2009, and again prior to receipt of Plaintiffs' Notice of Intent, EPA repeated its preference that

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[5] Defendants incorporate the factual description in Defendants' Motion for Summary Judgment ("Defs' Brief") (Docket #112) at 3-14, by reference. This brief also uses the same defined terms as in Defendants' Motion for Summary Judgment.

[6] Ashbaugh Decl., Ex. Y (Sept. 26, 1984 Individual Permit, number AK-004062-2). EPA delegated jurisdiction to DEC on October 31, 2008. *See* 73 Fed. Reg. 66243, 66244 (Nov. 7, 2008).

[7] Ashbaugh Decl., Ex. B (May 1988 NPDES Compliance Inspection Report and May 1987 Dive Report and Plan).

[8] Declaration of Shelli Knopik, Apr. 28, 2010 ("Knopik Decl.") (Docket # 40-2), ¶ 6.

[9] Ashbaugh Decl., Ex. C (December 16, 1999 EPA letter to Seward Terminal); Knopik Decl., ¶ 3.

[10] Ashbaugh Decl., Ex. D (February 9, 2011 EPA letter to Seward Terminal).

[11] *See, e.g.*, Ashbaugh Decl., Ex. CC (August 15, 2011 EPA Air Compliance Inspection Report); *id*., Ex. DD (August 15, 2011 EPA Water Compliance Inspection Report).

the General Permit was the proper permit for the Seward Terminal, and AES obtained continued coverage pursuant to AES Permit #AKR50CC38.[12]

Defendants' Best Management Practices and Improvements to the Seward Terminal

Since 2007, Defendants have implemented improvements to both operating procedures and equipment and adopted good housekeeping measures.[13] These efforts have minimized discharges into Resurrection Bay.

Nonetheless, Plaintiffs cite to four time periods in which they claim coal has spilled into Resurrection Bay. First, Plaintiffs point to an alleged event that occurred in April 2006, before either Defendant was involved with operating the Seward Terminal, when coal spilled onto the loading dock.[14] This type of event no longer happens at the facility because of improvements made at the facility, and an event of this magnitude has not happened since well before the Plaintiffs filed their Notice of Intent to Sue.[15] Second, Plaintiffs cite to a document relating to a proposed 2009 AES capital expenditure which indicated that coal remained on the Seward Terminal dock after loading ships.[16] The purpose of this document, however, was to fund a proposed custom-designed chute intended to minimize coal accumulation on the dock.[17] The chute was installed on the shiploader in 2009, before Plaintiffs served their Notice of Intent to Sue.[18]

Third, Plaintiffs assert that coal currently spills onto the covers of ships and from the

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[12] Ashbaugh Decl., Ex. G (April 5, 2009 EPA letter to AES); *id*., Ex. F (Notice of Intent to Discharge Acknowledgment).

[13] *See* Defs' Brief at 9-11 for a more complete rendition of Defendants' improvements and good housekeeping measures at the Seward Terminal.

[14] As explained in Defendants' accompanying Motion to Strike, Plaintiffs' Exhibit 18 should be stricken from the record as inadmissible hearsay.

[15] Supplemental Declaration of Victor Stoltz ("Stoltz Supp. Decl."), ¶ 5.

[16] Plfs' Brief at 14.

[17] Stoltz Supp. Decl., ¶ 6.

[18] *Id.*

shiploader into Resurrection Bay.[19] Setting aside its legal insignificance, even if some coal could fall onto the hold covers, the evidence indicates such coal would be swept into the ship's hold.[20] Indeed, there is no evidence that any coal that fell on hold covers subsequently entered Resurrection Bay. Moreover, Plaintiffs' contentions that coal currently falls from the shiploader directly into Resurrection Bay are based solely on facility operations that were upgraded before Plaintiffs filed their Notice of Intent to Sue, and on testimony that Plaintiffs misconstrue as germane to present conditions.[21] The evidence, including the cited testimony, establishes that any such event occurred prior to the upgrade in 2009, which was effective at controlling coal falling from the shiploader into the water.[22]

Finally, Plaintiffs attempt to support their allegation that carryback on the conveyor falls into Resurrection Bay by reference to alleged events that occurred in 2008 or earlier and to a hearsay document dated April 2008.[23] But since that time, Defendants have exceeded the best management practices prescribed by the Stormwater Plan and, as noted by Plaintiffs, have installed drip pans under the BC-14 conveyor to catch carryback that previously may have fallen into Resurrection Bay.[24] The drip pans have performed as they were designed and have collected carryback from the conveyor.[25]

Regulating and Permitting of the Seward Terminal's Coal Dust Emissions

Plaintiffs next attempt to characterize coal dust emissions from the Seward Terminal as

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[19] Plfs' Brief at 14.

[20] Mayberry Decl., Ex. C (Stoltz Dep. at 124:23-25 – 125:1-5).

[21] Plfs' Brief at 14 (citing testimony by Seward Terminal foreman Victor Stoltz).

[22] Mayberry Decl. Ex. C (Stoltz Dep. at 124:11-26 – 125:1-19); Stoltz Supp. Decl., ¶ 5.

[23] Plfs' Brief at 15. "Carryback" is defined as water—from precipitation and, at times, dust control—mixed with coal that sticks to the conveyer when it goes around the head pulley. Stoltz Supp. Decl., ¶ 7.

[24] Stoltz Supp. Decl., ¶ 9.

[25] Stoltz Supp. Decl., ¶ 9.

"discharges" that require an individual permit. Plaintiffs' position, however, ignores the ongoing and appropriate regulation of dust emissions through the federal Clean Air Act and EPA-approved State clean air regulations. As Plaintiffs admit, DEC (the agency that regulates air emissions at the Seward Terminal) is aware of the issue of windblown dust emissions from the Seward Terminal as a result of reports by Defendants, public input and inspections conducted by DEC personnel.[26]

In 2007 and 2008, DEC issued two Notices of Violations ("NOVs") to Defendants regarding the emission of wind-borne dust at the Seward Terminal, and in May 2010, DEC and Defendants resolved the NOVs by entering into the Compliance Order.[27] The Compliance Order specified a range of additional control measures, provided an ongoing mechanism for oversight and enforcement of those controls, and assessed a civil penalty.[28] On May 18, 2012, DEC determined that Defendants had satisfied all of their obligations under the Compliance Order and terminated the Compliance Order.[29] DEC also stated that it "appreciates [Defendants'] cooperation and interest in protecting Alaska's environment."[30]

Plaintiffs' Allegations Regarding Coal Dust Were Addressed by the Compliance Order

Plaintiffs' allegations regarding coal dust likewise primarily pre-date many of the upgrades and policies put in place by Defendants to reduce dust emissions at the Seward Terminal pursuant to the Compliance Order. Plaintiffs' above-noted examples of dust emissions that allegedly occurred in March 2007 and March 2008 were, in fact, the basis for DEC's issuance of the two NOVs that *led* to the Compliance Order.[31] The Compliance Order also

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[26] Ashbaugh Decl., Ex. EE.

[27] Declaration of Alice Edwards ("Edwards Decl.") (Docket # 116), ¶¶ 9-10.

[28] Ashbaugh Decl., Ex. T (Compliance Order at ¶ 31).

[29] Mayberry Decl., Ex. D (DEC termination letter).

[30] *Id.*

[31] Edwards Decl., ¶ 9.

addressed any alleged dust emission events from the Seward Terminal in 2009 and early 2010.[32]

Plaintiffs assert that complaints regarding coal dust have occurred more recently[33] but those allegations are based on observations from a single witness.[34] The witness reported those alleged occurrences to DEC, which determined either that those observations were not supported by the evidence or that Defendants were taking reasonable precautions to prevent dust in compliance with the law.[35] DEC's conclusions are consistent with its May 2012 termination of the Compliance Order.[36]

DEC and EPA Inspections

As Plaintiffs acknowledge, DEC and EPA have inspected the Seward Terminal on numerous occasions.[37] After each inspection, both agencies have concluded that the facility is in compliance with both the General Permit and air program requirements. For example, after a February 2010 DEC Water Division inspection that took place during shiploading operations, DEC reported that "[n]o visible dust was being generated at the end of the loading process and no coal debris was observed falling into the Bay."[38] Likewise, on August 15, 2011, EPA conducted a full site inspection of the Seward Terminal regarding its compliance with the Clean Water Act and the Clean Air Act.[39] Neither inspector noted any non-compliant emissions or discharges, questioned the applicability of the General Permit, or suggested that an individual

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[32] *Id.*

[33] Plfs' Brief at 22.

[34] Maddox Decl., ¶¶ 7, 28-32.

[35] Mayberry Decl., Ex. E (Maddox Dep.) at 140:25-142:25 (DEC and EPA have not determined any violations based on Mr. Maddox's reports of coal dust since issuance of the NOVs).

[36] Mayberry Decl., Ex. D (termination letter)

[37] Plfs' Brief at 16.

[38] Ashbaugh Decl., Ex. BB (February 19, 2010 APDES Inspection Report) at 4.

[39] Ashbaugh Decl., Ex. CC (August 15, 2011 EPA Air Compliance Inspection Report) at ACAT003328.

discharge permit was required for the facility.[40]

ARGUMENT

I. COAL SEDIMENT DISCHARGES FROM THE CONVEYOR AND SHIPLOADER AREA ARE PROPERLY PERMITTED AND DO NOT VIOLATE THE CLEAN WATER ACT.

Plaintiffs' extensive descriptions of coal sediment discharges are irrelevant to resolution of this case.[41] Because the General Permit under the NPDES program expressly contemplates coal discharges entering Resurrection Bay and Plaintiffs do not claim any violation of that permit, such discharges cannot be the basis for liability under the Clean Water Act. Although the General Permit requires Defendants to adopt various control measures to curtail coal sediment discharges,[42] it does *not* impose a zero discharge requirement.[43] Thus, such discharges are both (i) covered by the facility's permit; and (ii) shielded from liability. In addition, because Plaintiffs did not first exhaust their administrative remedies by raising this issue before the agencies that had permitted Defendants' discharges, they cannot challenge permit coverage first before this Court. Finally, even setting aside both the permit shield defense and Plaintiffs' failure to exhaust administrative remedies, Plaintiffs have not established that the agencies' classification of Defendants' discharges as stormwater was unreasonable.

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[40] *See* Ashbaugh Decl., Ex. CC (August 15, 2011 EPA Air Compliance Inspection Report); *id.*, Ex. DD (August 15, 2011 EPA Water Compliance Inspection Report).

[41] Nevertheless, as noted above, since 2007, Defendants have implemented many measures that have been effective in significantly reducing or eliminating coal falling into the Bay. *See* Defs' Brief at 9-11.

[42] Ashbaugh Decl., Ex. I (Stormwater Plan) at 11, 20, ARRC00001913, 1920.

[43] Declaration of Lynn J. Tomich Kent ("Kent Decl.") (Docket # 117), ¶ 10; *see also, e.g.*, Ashbaugh Decl., Ex. M (General Permit) at 19, ARRC00018754 (requiring permittee to "***minimize*** onsite erosion and sedimentation, and the resulting discharge of pollutants") (emphasis added). Within the General Permit, "the term 'minimize' means reduce and/or eliminate to the extent achievable using control measures (including best management practices) that are technologically available and economically practicable and achievable in light of best industry practice." *Id.* at 17, ARRC00018752.

A. Because EPA and DEC Permits Authorize Discharges of Coal Sediment from the Conveyor, Defendants Are Shielded from Liability.

As explained in Defendants' Motion for Summary Judgment,[44] Defendants are not subject to Clean Water Act citizen suit liability for discharges of coal sediment from the conveyor.[45] First, any such discharges are covered by the General Permit and by the Stormwater Plan that is an enforceable component of that permit. Thus they are authorized under the Clean Water Act. Second, irrespective of the fact that any such discharges have been properly permitted, Defendants' are shielded from liability. EPA and DEC have long been aware that these discharges occurred, and any such discharges were, thus, "within the reasonable contemplation" of the permitting authority. Given this knowledge, EPA and DEC confirmed that the existing General Permit was sufficient for the facility's discharges.[46] In doing so, the agencies provided Defendants protection under the statute's "permit shield" provision.

Discharges from the conveyor and shiploader are governed by the Seward Terminal's Stormwater Plan, which is an enforceable component of the facility's General Permit.[47] The Stormwater Plan lists Drainage Area H as the "*conveyor over water and shiploader*"[48] and identifies coal as the "suspected pollutant" that could discharge into the Bay from the

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[44] *See* Defs' Brief at Section II(A).

[45] Plaintiffs' brief refers generally to alleged discharges from the conveyor *and* shiploader. Both are part of the same structure and are considered to be one unit in the Stormwater Plan. *See* Ashbaugh Decl., Ex. I (Stormwater Plan) at 11, 41; ARRC00001913, 1943. Plaintiffs' brief also refers to alleged coal sediment discharges that land on hold covers of vessels and then fall into the Bay. Plfs' Brief at 14. Such discharges likely did not occur, *see infra* Section IV(A), but even if they did, they would not be relevant to this lawsuit because the point source conveyances for such discharges would not be the Defendants' structures at the facility, but the vessels, which the Defendants neither own nor operate.

[46] *See* 33 U.S.C. § 1342(k); Defs' Brief at 3-7, 11-13, 17-20.

[47] Ashbaugh Decl., Ex. M (General Permit) at 30, ARRC00018765.

[48] Ashbaugh Decl., Ex. I (Stormwater Plan) at 11, ARRC00001913.

conveyor.[49] The Stormwater Plan also lists mandatory controls "to prevent *coal* from entering the Bay."[50] Both EPA and DEC confirm that coal sediment discharges from the conveyor are covered under the General Permit.[51] And no one—neither DEC, EPA nor Plaintiffs—has alleged that Defendants have violated the General Permit.[52] Indeed, recent agency inspections demonstrate that Defendants are complying with the General Permit.[53]

Independent of the fact that a properly permitted discharge does not violate the Clean Water Act,[54] the statute provides an additional defense against claims relating to discharges that are not listed in a permit so long as they have been "reasonably anticipated by, or within the reasonable contemplation of, the permitting authority during the permit application process."[55] In other words, discharges that have been "adequately disclosed to the permitting authority"

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[49] *Id*. (emphasis added).

[50] *Id*. at 20, ARRC00001920 (emphasis added). Additionally, and as argued in Section II(D) of Defendants' summary judgment brief, Plaintiffs' claims are moot because the mandatory controls imposed by the General Permit constitute the same "reasonable measures" to control coal sediment discharges as would be required through an individual permit. *See generally* Defs' Brief at 24-25 (citing, *inter alia*, Kent Decl., ¶ 10 (noting that both a general and individual permit "would require implementation of reasonable measures designed to limit discharges of coal")).

[51] *See* Defs' Brief at Section II(A)(2) (citing, *inter alia*, Kent Decl., ¶ 8 ("[T]he [Stormwater Plan] for the Seward Terminal ***specifically covers*** discharges of coal from the shiploader and conveyor over water.")) (emphasis added); Ashbaugh Decl., Ex. DD (August 15, 2011 EPA Water Compliance Inspection Report) (detailing facility operations and coal sediment controls without identifying any violations or permitting issues).

[52] *See* Ashbaugh Decl., Ex. L (Sierra Club Dep.) at 23:14-17; *id*., Ex. HH (ACAT Dep.) at 25:17-21; Ex. BB (February 19, 2010 APDES Inspection Report); *id*., Ex. DD (August 15, 2011 EPA Water Compliance Inspection Report).

[53] Ashbaugh Decl., Ex. BB (February 19, 2010 APDES Inspection Report); *id*., Ex. DD (August 15, 2011 EPA Water Compliance Inspection Report).

[54] 33 U.S.C. § 1311(a) (prohibiting discharges except in compliance with various provisions under the act including 33 U.S.C. § 1342); 33 U.S.C. § 1342 (implementing the National Pollutant Discharge Elimination System ("NPDES") permitting program).

[55] *Piney Run Pres. Ass'n v. County Comm'rs of Carroll Cnty., Md.,* 268 F.3d 255, 268 (4th Cir. 2001), cited in Defs' Brief at 19-20.

cannot be the subject of a Clean Water Act enforcement action.[56] Here, both EPA and DEC knew of coal sediment discharges at every step of the permitting process.[57] Having relied upon the permits issued by EPA and DEC and having complied with their terms, Defendants are entitled to the permit shield.[58]

Plaintiffs' contention that EPA did not consider the Stormwater Plan when it approved the General Permit in 2009[59] is misleading. While EPA acknowledged AES' notice of intent on May 15, 2009, the agency made clear that coverage became effective thirty days later, on June 14, 2009. AES provided EPA with the Stormwater Plan in May 2009 *before coverage of the General Permit became effective*; EPA thus had a full opportunity to reject or modify any of the General Permit's provisions before it went into effect.[60] Moreover, Plaintiffs fail to indicate why EPA or (subsequently) DEC would not have been in a position to disapprove of or alter the General Permit's coverage of the Seward Terminal at any subsequent point. Neither agency ever did so. Indeed, although EPA and DEC inspections since the initiation of this lawsuit have involved full review of the Stormwater Plan, neither agency has objected to the express permitting of coal discharges under that Plan. Finally, the Deputy Commissioner of Alaska DEC, with responsibility over the DEC Water Program, recognizes that the Stormwater Plan "specifically covers" the coal discharges at issue and that no separate, individual permit is required.[61]

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[56] *Piney Run*, 268 F.3d at 268-69.

[57] *See generally* Defs' Brief at Section II(A)(2).

[58] *See* Defs' Brief at 19-20.

[59] Plfs' Brief at 12.

[60] Declaration of Bartly Kleven in Support of Motion for Summary Judgment ("Kleven Decl.") (Docket # 115), ¶ 5 (noting that AES provided EPA with the text of the Stormwater Plan, with its explicit references to coal discharges, in May 2009, *prior to* the effective date of continued coverage under the General Permit). Similarly, Plaintiffs received a copy of the draft Stormwater Plan well before it was submitted to EPA. *Id.* at ¶ 6; see also Mayberry Decl., Ex. E (Maddox Dep.) at 26:26-27:5.

[61] Kent Decl., ¶¶ 8, 11.

B. Plaintiffs Did Not Exhaust Administrative Remedies and Thus Cannot Attack the General Permit's Coverage in This Action.

Not only did EPA have an opportunity to review coverage under the General Permit, so did Plaintiffs. As argued in Defendants' summary judgment motion, Plaintiffs should have raised any objections to covering the Seward Terminal under the General Permit with EPA pursuant to 40 C.F.R. § 122.28(b)(3).[62] Plaintiffs' failure to do so represents yet another independent reason why their first claim fails and why any factual issues regarding discharge of coal sediment are not ripe for review in this action. In short, "the importance of deferring to and relying on agency 'expertise,'"[63] counsels that the Court should stay its hand in the absence of a regulatory decision addressing Plaintiffs' properly presented concerns.[64]

C. Coverage of Coal Sediment Under the General Permit Is Reasonable, Whether It is Characterized as Stormwater or Nonstormwater.

This Court should defer to agency permitting decisions unless they are arbitrary and unreasonable.[65] It is irrelevant whether coal sediment is stormwater or nonstormwater because under either formulation (and setting aside the Clean Water Act's permit shield defense and Plaintiffs' failure to exhaust administrative remedies), it was reasonable for EPA and DEC to cover it within the General Permit. Plaintiffs' arguments in opposition to the agencies'

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[62] *See generally* Defs' Brief at 22-23.

[63] *See W. Radio Servs. Co. v. Qwest Corp.*, 530 F.3d 1186, 1199-1202 (9th Cir. 2008).

[64] In previous submissions, Plaintiffs advanced an implausible construction of 40 C.F.R. § 122.28(b)(3)(i). *See* Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Judgment on the Pleadings at 14 (Docket # 41) at 19. Plaintiffs observed that the regulation specifies that a person "may" petition EPA to require a discharger authorized by a general permit to obtain an individual permit. *Id*. In context, this language means that a person is not "required" to object to coverage by a general permit, and may choose not to object at all. Conversely, anyone who chooses to do so "may" object to coverage under the general permit. Nothing in the language of section 122.28(b)(3)(i) suggests the presence of another remedy or indicates that one should be able to bring a matter of this nature directly to the court. *See* Defs' Brief at 22-23.

[65] *See* Defs' Brief at 21-22.

approach—that coal can *never* be stormwater and that nonstormwater can *never* be covered under a general NPDES permit—are unfounded.

Plaintiffs first argue that wet coal sediment from the conveyor is not stormwater.[66] But Plaintiffs' formulation of the distinction between "stormwater" and "nonstormwater" yields absurd results. Obviously, *any* stormwater discharge is more than just water; necessarily, stormwater discharges *always* contain a Clean Water Act "pollutant" such as dirt, debris, or, in this case, possibly coal. If it did not carry a pollutant it would not require an NPDES permit. Indeed, "it seems virtually impossible for rain water to travel over the ground without picking up at least a minimal amount of pollutants."[67] Coal sediment contains the same constituents—water and a pollutant—as any other discharge covered under a stormwater permit. EPA and DEC therefore could have reasonably concluded that coal sediment from the conveyor was stormwater.[68]

Second, Plaintiffs are mistaken in asserting that "non-stormwater discharges *must* … be covered under a separate NPDES permit" rather than the General Permit.[69] The regulation cited by Plaintiffs, 40 C.F.R. § 122.26(c)(1)(i)(C), simply does not stand for the proposition that

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[66] Plfs' Brief at 13.

[67] *See, e.g., Concerned Area Residents for the Env't v. Southview Farm*, 834 F. Supp. 1422, 1428 (W.D.N.Y. 1993) *rev'd sub nom.*, 34 F.3d 114 (2d Cir. 1994).

[68] Here, because no administrative action allowed the agency to defend its coverage under the General Permit, this Court does not have the benefit the agency's explanation. The best evidence of the agency's regulatory posture is the reasoning contained in a declaration from DEC's Deputy Commissioner. There, the Deputy Commissioner concludes that ". . . for purposes of the NPDES/APDES program under the CWA, no other permit, other than the MSGP, is required." Kent Decl., ¶ 11.

[69] *Id.* at 7.

nonstormwater discharges can never be included in a stormwater permit.[70] Rather, 40 C.F.R. § 122.28(a)(2) explicitly grants a permitting agency discretion to authorize related discharges, including those involving stormwater and non-stormwater, under the umbrella of an NPDES general permit. If discharges involve "the same or substantially similar types of operations," "the same types of wastes," "the same or similar monitoring," and "the same operating conditions"—and that are, "*[i]n the opinion of the Director*, [] more appropriately controlled under a general permit than under individual permits,"[71] the agency may exercise this authority. Coal sediment from the conveyor meets this standard because (i) it originates from the same coal handling operations that generate other stormwater discharges from the Seward Terminal, (ii) it is comprised of coal and water and thus involves the same type of wastes, and (iii) it is monitored using the same regular visual inspections.[72] Thus, it was well within the discretion of EPA and DEC to include coal sediment within the General Permit.

II. PLAINTIFFS CANNOT ESTABLISH THAT WIND-BORNE DUST EMISSIONS CONSTITUTE A POINT SOURCE DISCHARGE THAT REQUIRES AN NPDES PERMIT.

Allegations that wind-borne dust has fallen on Resurrection Bay do not establish a Clean Water Act violation. Both EPA and DEC have concluded that wind-borne coal dust is already properly addressed through existing permitting and regulatory approaches, and that no further

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[70] Plfs' Brief at 7. The regulation, which Plaintiffs imprecisely cite as 40 C.F.R. § 122.26(c)(1), requires that as part of its permit application, a permittee must certify that all outfalls "have been tested or evaluated for the presence of non-storm water discharges which are not covered by a NPDES permit." Plaintiffs commit a basic grammatical error: the lack of a comma after the word "discharges" means that some non-storm water discharges *are* covered by NPDES permits. The regulatory requirement here is that facilities applying for a stormwater discharge permit must also identify any non-stormwater discharges they may have that are not covered by a permit, so that they too can become permitted as needed. The regulation does not state that non-stormwater discharges cannot be authorized under a stormwater permit.

[71] *See* 40 C.F.R. § 122.28(a)(2).

[72] *See* Ashbaugh Decl., Ex. I (Stormwater Plan) at 11, 20, 24-33, ARRC00001913, 1922, 1926-1935.

permit is necessary.[73] More fundamentally, Plaintiffs cannot claim a Clean Water Act violation because wind-borne dust from the Seward Terminal does not constitute a "point source" discharge.

The authorities upon which Plaintiffs rely undermine their arguments and prove that wind-borne coal dust from the facility does not require a Clean Water Act permit. For example, Plaintiffs erroneously cite EPA guidance as indicating that "piles" are point sources. This is a remarkable typographical error: the guidance actually states that "*pipes*" are point sources.[74] Similarly, while Plaintiffs' air emissions expert opines on the possibility of dust being carried from the Seward Terminal to the Bay, that same expert also recognizes that fugitive dust emissions are regulated not by Clean Water Act permits but through the Clean Air Act.[75] Finally, Plaintiffs' analysis of the available case law defining Clean Water Act "point sources" fails to mention the requirement that a discharge must be "channelized" to constitute a point source. It also ignores consistent findings that emissions akin to the dust at the Seward Terminal do not occur from a "discernible, confined and discrete conveyance" and thus do not require an NPDES permit.[76]

Even if Plaintiffs hypothetically could prove that wind-borne dust emanates from a "point source," they cannot establish a Clean Water Act violation subject to citizen suit. First, dust is already being controlled under the Seward Terminal's General Permit through Stormwater Plan provisions aimed at minimizing coal discharges by limiting coal dust that could be carried by

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[73] *See* Defs' Brief at 27-30. Plaintiffs do not allege any violations of those existing regulatory requirements governing dust emissions.

[74] Plfs' Brief 27.

[75] *See* Defs' Brief at 25 and fn. 139, 140, 141 (citing Ashbaugh Decl., Ex. N (Klafka Dep.) at 59:7-10; 11-21).

[76] Defs' Brief at 31-41.

stormwater.[77] Second, Plaintiffs' second claim has been mooted because there is no "reasonable prospect" of future violations. Plaintiffs' second claim should therefore be dismissed.

A. DEC and EPA Have Concluded That No Clean Water Act Permit Is Necessary for Dust, and That Conclusion Is Entitled to Deference.

As addressed in Defendants' Brief, this Court should defer to the permitting agencies' rational conclusion that dust emissions from the Seward Terminal are properly regulated under the Clean Air Act and, therefore, are not subject to Clean Water Act permit requirements.[78] The Deputy Commissioner of DEC, the regulatory entity responsible for administering both the Clean Water Act and the Clean Air Act in Alaska, has expressly stated that the Seward Terminal does not need an NPDES permit for wind-blown dust.[79] EPA has similarly concluded that dust from the facility is being appropriately addressed under EPA-approved state air regulations.[80]

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[77] Even though dust that is carried off the facility solely via wind is not regulated under the Clean Water Act, measures to control dust are already in place at the Seward Terminal under both Clean Air Act and Clean Water Act-related requirements. Because wind-borne dust that falls *onto the facility* could be deposited into stormwater that is subsequently discharged from the facility, DEC already regulates dust at the Seward Terminal under the facility's existing Stormwater Plan. *See* Defs' Brief at 41-42.

[78] *See* Defs' Brief at 30-31; *see also Chem. Mfrs. Ass'n v. Natural Res. Def. Council*, 470 U.S. 116, 125 (1985) (citing *Train v. Natural Res. Def. Council*, 421 U.S. 60, 75, 87 (1975)); *Citizens for Clean Air v. EPA*, 959 F.2d 839, 844 (9th Cir. 1992).

[79] *See Defs' Brief* at 27-28 and n. 148 (quoting Kent Decl., ¶¶ 11-12 ("While I was Director of the Division of Water I did not believe that a separate NPDES/APDES permit (general or individual), aside from the MSGP, was required for coal discharges or fugitive dust from the coal storage areas, equipment, or other locations at the Seward Terminal that may end up in waters of the United States . . . . I still believe that, for purposes of the NPDES/APDES program under the CWA, no other permit, other than the MSGP, is required.")).

[80] Defs' Brief at 29-30; *see also, e.g.,* Ashbaugh Decl., Ex. S (Dec. 13, 2006 letter from EPA to Senator Ted Stevens) (reflecting EPA's understanding that dust from the Seward Terminal is regulated under Alaska clean air regulations approved by EPA); *id*., Ex. CC (Aug. 15, 2011 EPA Air Compliance Inspection Report) at 7, ACAT003335 (noting that the Seward Terminal "has undertaken a comprehensive approach to controlling dust from coal storage and handling").

Consistent with these formal statements, the agencies have time and again addressed dust at the Seward Terminal under their Clean Air Act authority and not under the Clean Water Act.[81]

Plaintiffs directly acknowledge both the scrutiny to which the Seward Terminal has been subjected and the comprehensive dust control measures required by the permitting authorities.[82] Plaintiffs have identified no facility at which DEC or EPA has ever manifested an intent to regulate windborne dust under a Clean Water Act permit.[83] The only agency guidance Plaintiffs identify instructs that EPA does not regulate emissions of the type claimed here as point source pollution.[84] And as longstanding precedent confirms, the rational conclusions of these agencies are entitled to deference.[85]

Plaintiffs' failure to unearth any authority requiring a Clean Water Act permit for wind-borne dust underscores the fundamental defects in their argument. EPA and state agencies do not require operations that produce wind-borne dust to obtain NPDES permits for those

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[81] Defs' Brief at 28-30 (describing DEC and EPA correspondence and inspection activities confirming that windborne dust is regulated under state clean air requirements and does not require a permit); *see also* Edwards Decl., ¶ 11 (referencing DEC's determination that "SOPs and other control mechanisms and requirements of the Compliance Order . . . comply with applicable law governing airborne dust emissions from the Seward Coal Terminal").

[82] *See, e.g.*, Plfs' Brief at 16 ("The [Seward Terminal] has been inspected by DEC on numerous occasions to evaluate how the [Seward Terminal] is controlling dust and whether coal dust is leaving the [Seward Terminal] property boundaries."); *id*. at 21 (describing activities in response to Compliance Order).

[83] Plaintiffs' expert testifies to just the opposite: that he has never seen or heard of an agency requiring a Clean Water Act permit for windblown dust. See Defs' Brief at 25; Ashbaugh Decl., Ex. N (Klafka Dep.) at 132:11-16 ("Q: Are you aware of even one facility where fugitive air emissions that made their way into the air, traveled for a distance, fell to a surface water were in fact regulated by Clean Water Act NPDES permit? A: Not that I recall.").

[84] *See infra*, Section II(B)(1) (discussing EPA's *Nonpoint Source Guidance*, which refers to "atmospheric deposition" as a traditional example of nonpoint source pollution).

[85] *See* Defs' Brief at 38 (quoting *Chem. Mfrs. Ass'n*, 470 U.S. at 125 (citing *Train*, 421 U.S. at 75, 87)).

emissions, even where that dust may settle on waters of the United States.[86] Plaintiffs' own expert admits that fugitive dust is regulated under the Clean Air Act rather than the Clean Water Act.[87] Not surprisingly, he cannot identify a single one of the thousands of coal loading operations across the country that holds a Clean Water Act permit for coal dust, nor has he ever advised one to obtain such a permit.[88] Because the regulatory agencies with authority over dust emissions have already concluded that no permit is required for such emissions, it is Plaintiffs are not entitled to summary judgment on their second claim.

B. Wind-borne Dust Emissions from the Seward Terminal Are Not Point Source Discharges.

Plaintiffs fail to demonstrate how wind-borne dust emissions can constitute point source discharges under the Clean Water Act. Instead, they simply conclude that because "coal dust can be traced to the coal stockpiles, the conveyor systems, the stacker/reclaimer, the ship loader and the railcar unloader[, a]ll of these facilities at the [Seward Terminal] are consequently point sources."[89] This presumption is far too broad and would lead to absurd results. Under Plaintiffs' theory, all manner of sources that existing authority defines as non-point sources would be transformed into point sources that would require permits. Indeed, Plaintiffs' definition reads the descriptor "point" out of the term "point source" altogether and simply describes a "source"–that is, a place from which a pollutant may be released or to which a pollutant can be traced. To constitute a point source, however,[90] the dust must do more than just originate from various named locations within the Seward Terminal. Rather, it must be "channelized" by a "discernible, confined and discrete conveyance" that discharges it into the Bay.[91] This is not the

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[86] *See* Defs' Brief at 27-30.

[87] *See id.* at 25; Ashbaugh Decl., Ex. N (Klafka Dep.) at 59:7-10.

[88] *See* Defs' Brief at 26; Ashbaugh Decl., Ex. N (Klafka Dep.) at 132:11-16, 134:8-12.

[89] *See* Plfs' Brief at 26.

[90] *See* 33 U.S.C. § 1362(12).

[91] Defs' Brief at 31-32.

case for the Seward Terminal airborne dust emissions, and thus they do not require a Clean Water Act permit.

1. EPA guidance and case law instruct that windborne dust emissions from coal stockpiles are not point source discharges.

Wind-borne dust emissions from the coal stockpiles at the Seward Terminal cannot be point source discharges because they are not discharged via any channelized conveyance. Legal authority demonstrates that windborne dust emissions from a stockpile (or any other location) are not discharges from a Clean Water Act point source.[92] Plaintiffs' contrary contention relies on EPA Guidance, which Plaintiffs misquote, and case law that actually confirms the distinction between channelized "point sources" that are subject to the Clean Water Act and nonchannelized sources like wind-borne dust that are not.

Plaintiffs' reliance upon EPA guidance to support the proposition that "piles" are point sources[93] is ill-founded. Plaintiffs claim that EPA's 1987 *Nonpoint Source Guidance* characterizes point source pollution as a discharge "at a specific, single location (such as a pile)."[94] In reality, the 1987 guidance instructs that "nonpoint source pollution does not result from a discharge at a specific, single location (*such as a single pipe*)."[95] Thus, the actual language of the guidance subverts, rather than supports, Plaintiffs' argument. A "pipe," — not a "pile"—exemplifies a traditional "channelized" discharge point that constitutes a "point source" under the Clean Water Act.

Even beyond this typographical error or misquotation, Plaintiffs ignore the plain language and intent of the EPA Guidance. The above-referenced quote continues by explaining that nonpoint source pollution "generally results from land runoff, precipitation, *atmospheric*

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[92] Defs' Brief at 31-39.

[93] Plfs' Brief at 27.

[94] *Id.* at 34 (emphasis in original).

[95] Mayberry Decl., Ex. F at 7 (EPA Office of Water, *Nonpoint Source Guidance* 3 (1987)) (emphasis added) (also cited in Defs' Brief at 35). Presumably, this misrepresentation was inadvertent.

deposition, or percolation."[96] The guidance further confirms EPA's view that wind-borne dust emissions are nonpoint source discharges that do not require a Clean Water Act permit.[97]

Even setting aside EPA's plain guidance on the issue, Plaintiffs' argument that "piles" are necessarily CWA point sources also fails on fundamental legal grounds.[98] In each of the "pile" cases cited by Plaintiffs, the finding of a point source was not dependent on pollutants emanating from a "pile." Rather, the point source finding turned on the nature of the *conveyance* – more specifically, whether runoff from the pile was conveyed through some system of ditches, gullies, sumps, or other identifiable pathways to waters of the United States.[99] As emphasized in *Abston Construction*, the "point source" definition does not encompass "unchanneled and uncollected surface waters."[100] "The ultimate question is whether pollutants were discharged from 'discernible, confined, and discrete conveyance[s][.]'"[101]

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[96] *Id*. (emphasis added).

[97] *See also* Nonpoint Source Program and Grants Guidelines for States and Territories, 68 Fed. Reg. 60653, 60655 (Oct. 23, 2003) ("Nonpoint source pollution is caused by rainfall or snowmelt moving over and through the ground and carrying natural and human-made pollutants into lakes, rivers, streams, wetlands, estuaries, other coastal waters, and ground water. Atmospheric deposition and hydrologic modification are also sources of nonpoint pollution.").

[98] *See* Plfs' Brief at 34 (citing cases).

[99] *See Sierra Club v. Abston Constr. Co.*, 620 F.2d 41, 45 (5th Cir. 1980) (adopting Government's view that mining runoff, such as that from a material pile, may constitute point source pollution if the runoff "discharges into a navigable body of water by means of ditches, gullies and similar conveyances"); *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1009, n.17 (11th Cir. 2004) (relying on *Abston Construction* in holding that runoff from "piles of debris" which traveled to water through "erosion gullies" constitutes point source pollution). *See also* Defs' Brief at 47 (discussing *Friends of Santa Fe Cnty. v. LAC Minerals, Inc.*, 892 F. Supp. 1333, 1359 (D.N.M. 1995) (holding that natural "seeps" containing acid mine drainage from collected spoil piles are ***not*** point sources and reflecting need for channelization for discharge from a pile (or other source) to be characterized as point source pollution)).

[100] *Abston Constr.*, 620 F.2d at 47 (quoting *Consol. Coal Co.*, 604 F.2d at 249; *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1373 (4th Cir. 1976)).

[101] *Abston Constr*., 620 F.2d at 45.

Consolidated Coal v. Costle, cited by Plaintiffs, further reinforces that an effluent stream must be channelized to constitute a point source discharge. In that case, the Fourth Circuit considered the validity of Clean Water Act regulations governing, among other things, discharges from "coal preparation plants" and "coal preparation plant areas," the latter of which may include "coal refuse piles" or "coal storage piles."[102] Contrary to Plaintiffs' assertion,[103] the court did *not* find that any particular coal storage stockpiles were point sources. Rather, in the face of arguments that the regulations might inappropriately treat *nonpoint* runoff as a point source discharge, the court upheld the regulations, reasoning that the provision in question clearly "applies only to discharges from point sources" and that "[t]his definition excludes unchanneled and uncollected surface waters."[104] Thus, pollutants released from coal piles do not inherently constitute Clean Water Act point source discharges. Unless some further channelization of the pollutant occurs (for example, via a pipe), no point source exists. This holding is consistent with Ninth Circuit law holding that "pits that collect . . . waste rock do not constitute point sources within the meaning of the CWA" because seepage from the waste pits was "not collected or channeled."[105]

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[102] *Consolidated Coal v. Costle*, 604 F.2d 239, 249-50 (4th Cir. 1979), *rev'd on other grounds*, *EPA v. Nat'l Crushed Stone Ass'n*, 449 U.S. 64 (1980) (discussing 40 C.F.R. §§ 434.11(e), (f)).

[103] *See* Plfs' Brief at 26-27.

[104] *Consolidated Coal*, 604 F.2d at 249-250.

[105] *Greater Yellowstone Coal. v. Lewis*, 628 F.3d 1143, 1153 (9th Cir. 2010); *accord. Ecological Rights Found. v. Pac. Gas & Elec. Co.*, 803 F. Supp. 2d 1056, 1063 (N.D. Cal. 2011) (noting "critical" distinction between discharges through "a drainage system specifically designed and constructed to work [logging] roads [and] chemical pollutants . . . alleged to wash off [utility poles] and eventually make their way to [water] through natural means that are separate and distinct from the Poles"); *see also Nw. Envtl. Def. Ctr. v. Brown*, 640 F.3d 1063, 1070 (9th Cir. 2011) ("Stormwater that is not collected or channeled and then discharged, but rather runs off and dissipates in a natural and unimpeded manner, is not a discharge from a point source."). *See also* Defs' Brief at 37-39.

Simply gathering material together in one place and exposing it to the elements is not sufficient to create a point source. This is all that Plaintiffs allege happened at Seward Terminal, and, indeed, all that occurs with respect to wind-borne dust emissions.

2. **Windblown dust from the Seward Terminal is not discharged from a "discernible, confined and discrete conveyance**."

Plaintiffs are similarly misguided in arguing that that individual facility systems and locations from which dust can be picked up by the wind (for example, the coal stockpile, the railcars, and the conveyor) constitute a Clean Water Act point source.[106] In making this argument, Plaintiffs ignore the question of "how coal is *conveyed* (for example, randomly, via wind rather than through an outfall pipe)."[107] But the nature of the conveyance is critical to the point source inquiry—it must be "discernible, confined and discrete."[108] Because no such conveyance has been or can be identified here, Plaintiffs' cannot demonstrate a point source discharge.

The pesticide spraying cases cited by Plaintiffs are inapposite.[109] Each of these cases involve forceful, focused, directed spraying of a pollutant into a water body, by means of a spraying apparatus that did constitute a "confined and discrete conveyance" of pollutants to receiving waters and thus required an NPDES permit.[110] Plaintiffs' discussion of *Peconic Baykeeper* only reinforces this point, as the Second Circuit describes the "source of the

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[106] *See* Plfs' Brief at 27-28.

[107] Plfs' Brief. at 27 (emphasis added).

[108] *See* 33 U.S.C. § 1362(14) (emphasis added); *see also* Plfs' Brief at 26 (recognizing the definition of a point source).

[109] Plfs' Brief at 27-28.

[110] Defs' Brief at 35-36 (discussing *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren*, 309 F.3d 1181, 1185 (9th Cir. 2002) ("[A]n airplane fitted with tanks and mechanical spraying apparatus is a 'discrete conveyance.'"); *Peconic Baykeeper, Inc. v. Suffolk Cnty.*, 600 F.3d 180, 187-88 (2d Cir. 2010) (finding active pesticide spraying over creeks to be a point source discharge); and *No Spray Coal., Inc. v. City of N.Y.*, No. 00 Civ. 5395 (GBD), 2005 WL 1354041, at *5 (S.D.N.Y. Jun. 8, 2005) (finding insecticides spraying over navigable waters from helicopters and trucks to be point source discharges).

discharge" as the specific "spray apparatus," not the entire truck or helicopter.[111] Similarly, in *Cordiano v. Metacon Gun Club, Inc.*,[112] the court recognized that a discharge must be "channelized" by the conveyance in order to show a point source.[113] Thus, like the "lead . . . that migrate[d] to jurisdictional wetlands as airborne dust" in *Cordiano*, the claimed windblown coal dust emissions here "do[] not constitute a discharge from a point source."[114]

The wind-borne dust at issue in this case was not channelized and conveyed via forceful spraying, pipe, conduit, drainage system, or any other "discernible, confined and discrete conveyance." Instead, as Plaintiffs themselves reiterate, the dust was released and distributed by wind alone.[115] Plaintiffs have not demonstrated that wind itself constitutes a "discernible, confined and discrete conveyance," nor can they. Because the aerial deposition of wind-borne dust on Resurrection Bay cannot constitute a Clean Water Act point source discharge as a matter of law, this Court should deny summary judgment to Plaintiffs on their second claim.

C. Even if the Airborne Dust that Enters Resurrection Bay Could Be Characterized as a Point Source Discharge that Requires a Clean Water Act Permit, the Discharge Does Not Result in Any Clean Water Act Violation.

Even if wind-borne dust from the Seward Terminal was hypothetically determined to have been discharged from a Clean Water Act "point source" to Resurrection Bay, Plaintiffs'

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[111] Plfs' Brief at 28 (quoting *Peconic Baykeeper*, 600 F.3d at 188).

[112] Defs' Brief at 36-37 (discussing *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199 (2d Cir. 2009)).

[113] *Cordiano*, 575 F.3d at 221-22 (citing *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 510 (2d. Cir. 2005)); *Appalachian Power Co.*, 545 F.2d at 1373; *Envtl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 842 n.8 (9th Cir. 2003); *Shanty Town Assocs. LP v. EPA*, 843 F.2d 782, 785 n.2 (4th Cir. 1988); *Abston Constr. Co.*, 620 F.2d at 47; *see also Nw. Envtl. Def. Ctr.*, 640 F.3d at 1070 ("Stormwater that is not collected or channeled and then discharged, but rather runs off and dissipates in a natural and unimpeded manner, is not a discharge from a point source.").

[114] *Cordiano*, 575 F.3d at 224.

[115] Plfs' Brief at 28; *see also* Complaint (Docket # 1), ¶ 61 ("When the prevailing wind is from the north and is of sufficient speed, ***wind transports coal dust*** from the stockpiles, railcar dumping facility, stacker-reclaimer, ship loader and conveyor systems into Resurrection Bay.") (emphasis added).

second claim fails because, as discussed in Defendants' motion, such releases are covered under the General Permit.[116] Because the permitting agencies had full knowledge of wind-borne dust at the facility,[117] and because both the General Permit and the Stormwater Plan expressly address dust, requiring minimization of dust that could be entrained in the facility's stormwater discharges,[118] the Clean Water Act's statutory shield against liability applies.[119] This is confirmed by the DEC Deputy Commissioner's conclusion that "no further permit" is needed to address wind-borne dust.[120]

In addition, Plaintiffs' claims of Clean Water Act violation are mooted by Defendants' control measures and by DEC's active regulation and enforcement of wind-borne dust from the Seward Terminal.[121] Although Plaintiffs rely on their expert's opinion that "coal dust from the [Seward Terminal] will continue to become airborne and deposited in Resurrection Bay[,]" this conclusion is ultimately immaterial to the question of future violations because this very same expert also acknowledges the practical impossibility of achieving "zero emissions"[122] and agrees that the Seward Terminal takes a "comprehensive" approach to controlling dust."[123] As the Director of DEC's Air Quality Division explained, in addition to providing "reasonable precautions for airborne dust emissions" and protecting "human health and the environment," AES's Standard Operating Procedures "*comply with applicable law governing airborne dust*

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[116] *See* Defs' Brief at 41-42.

[117] Plaintiffs have documented many examples of agency acknowledgment of dust issues at the facility. *See* Plfs' Brief at 16 (discussing DEC inspection reports), 19 (describing complaints to DEC), 21 (discussing enforcement action and Compliance Order by DEC).

[118] *See* Kent Decl., ¶ 7.

[119] *See* 33 U.S.C. § 1342(k).

[120] *See supra* Section II(A); Defs' Brief at 27, n. 148 (citing Kent Decl., ¶¶ 11-12).

[121] *See* Defs' Brief at 42-47.

[122] Ashbaugh Decl., Ex. N (Klafka Dep.) at 13:13-17.

[123] Ashbaugh Decl., Ex. N. (Klafka Dep.) at 71:12-15.

emissions."[124] Whether or not they are subject to a Clean Water Act permit, wind-borne dust emissions have been adequately addressed through existing control measures that meet regulatory requirements for minimizing releases.[125] As a result, Plaintiffs cannot demonstrate a "realistic prospect"[126] of future violations, and Plaintiffs' cause of action is moot.

III. PLAINTIFFS' ALLEGATIONS REGARDING SNOW REMOVAL DO NOT ESTABLISH A CLEAN WATER ACT VIOLATION.

Plaintiffs claim that when Defendants remove alleged coal-laden snow from the Seward Terminal dock, they violate the Clean Water Act. Plaintiffs' claim is without merit for three reasons. First, as noted in Defendants' motion for summary judgment, snow on the Seward Terminal dock is covered by the General Permit. Second, the fact that Defendants remove that snow through the use of a plow does not cause melting snow to become something other than stormwater. Finally, Plaintiffs' factual allegations are contrary to their witness's sworn testimony, unsupported and fail to provide a basis for their claim.

A. Plaintiffs Have No Legal Claim Regarding the Removal of Snow from the Seward Terminal Dock.

1. The Seward Terminal's dock and snow removal are covered by the General Permit.

It is uncontested that the General Permit covers any stormwater discharges from the coal loading dock, which is located within Drainage Area H and runs parallel to the conveyor over Resurrection Bay.[127] Within Drainage Area H, the Stormwater Plan identifies coal as a

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[124] Edwards Decl., ¶ 11 (emphasis added).

[125] Indeed, despite intense governmental scrutiny prior to and during implementation of the Compliance Order, regulatory authorities have not cited the Seward Terminal for any violations under the applicable Clean Air Act regulatory scheme in more than four years – since well before Plaintiffs' Notice of Intent letter and Complaint in this action.

[126] *See, e.g., Envtl. Conservation Org. v. City of Dallas*, 529 F.3d 519, 528 (5th Cir. 2008).

[127] Ashbaugh Decl., Ex. K (Updated Stormwater Plan) at 41-44 (maps and diagrams showing location of the dock in relation to the conveyor and shiploader; *id*., Ex. L (Sierra Club Dep.) at 30:14 – 31:11.

suspected pollutant that could discharge into Resurrection Bay.[128] In addition, the Stormwater Plan identifies the dock and ship loader together as an area where potential spills and leaks could occur into Resurrection Bay.[129] Thus, stormwater discharges from the loading dock, including associated pollutants that are inherent to stormwater discharges—in this case residual amounts of coal carried by snow melt runoff—are covered by the General Permit.[130]

Snow removal at the Seward Terminal is likewise covered by the General Permit and the Stormwater Plan. The Stormwater Plan includes a best management practice that snow is to be managed *within the bounds of the facility* to maximize treatment in the onsite ponds.[131] Specifically, the Stormwater Plan states:

> Snow removal piles are stored in locations to prevent or minimize storm water contamination.
>
> …
>
> Snow is managed within the coal loading facility so that contaminated snowmelt drains to the sediment control structures rather than directly to outfalls.[132]

AES complies with the Stormwater Plan and plows and piles snow at appropriate locations at the facility at all times.[133] Plaintiffs' allegations that Defendants moved, pushed or placed snow from the Seward Terminal somewhere other than as set forth by the Stormwater Plan, baseless as they may be, are allegations that Defendants have violated the Stormwater Plan and the General Permit. Yet Plaintiffs concede that they are not claiming any violations of the Stormwater Plan

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[128] Ashbaugh Decl., Ex. K (updated Stormwater Plan) at 11.

[129] *Id.* at 15.

[130] *See* 40 C.F.R. § 122.26(b)(14) ("*Stormwater discharge associated with industrial activity* means the discharge from any conveyance that is used for collecting and conveying stormwater and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant."); *see also* Defs' Brief, Section IV(A).

[131] Ashbaugh Decl., Ex. K (Stormwater Plan) at ¶¶ 3.1 and 3.5.4.

[132] *Id.*

[133] Stoltz Supp. Decl., ¶ 4.

or the General Permit.[134] Plaintiffs cannot escape this concession by now arguing that conduct allegedly in violation of the General Permit affords them a separate claim under the Clean Water Act. Plaintiffs' claims related to allegations of Defendants' snow plowing fail for this reason alone.

2. Plaintiffs' claim that melting snow ceases to be stormwater once it is plowed from the Seward Terminal dock is nonsensical.

Acknowledging that snow melt runoff from the Seward Terminal dock is covered by the General Permit, Plaintiffs assert that once the Defendants remove the snow from the dock, the snow is no longer covered due the presence of an intervening point source – a plow. Plaintiffs' assertion is nonsensical. Defendants' alleged use of a snow plow as an intervening point source does not alter the makeup of the snow. Melting snow (i.e., snow melt runoff) that is covered by the General Permit does not cease to be stormwater under the Clean Water Act solely because it is collected and/or moved. Defendants are unaware of any authority that supports Plaintiffs' position. Instead, 40 C.F.R. § 122.26(b)(14) defines "stormwater discharge associated with industrial activity" to include "discharges from *any conveyance* that is used for collecting and conveying storm water."[135] Snow pushed into the water, like snow entering the water through any other point source, remains stormwater and is within the scope of the General Permit.[136]

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[134] Ashbaugh Decl., Ex. L (Sierra Club Dep.) at 23:14-17; *id*., Ex. HH (ACAT Dep.) at 25:9-19.

[135] 40 C.F.R. § 122.26(b)(14) (emphasis added); H.R. Rep. No. 92-911 at 125 (1971) (conveyances may include such things as trucks, transportation by movers, etc); *see also Nw. Envtl. Def. Ctr.*, 640 F.3d at 1072; *Avoyelles Sportsman League v. Marsh*, 715 F.2d 897, 922 (5th Cir. 1983).

[136] Plaintiffs own citation proves the same. *See* Plfs' Ex. 87 (*Evaluation of Snow Disposal into Near Shore Marine Environments*, report prepared for DEC by CH2M Hill (June 2006)) at 21 ("collected snow" can be defined as stormwater and covered by a general permit).

Thus, even if Plaintiffs could prove that such an occurrence has taken place, Plaintiffs' intervening point source theory must be rejected.[137]

Because the alleged discharges from the Seward Terminal dock are covered under the General Permit, there is no need for any additional Clean Water Act permit.[138] Further, even if DEC and EPA both erred in permitting these discharges under the General Permit, that permit shields Defendants from Plaintiffs' claim that these discharges are unauthorized—for the reasons discussed in Section I(A), *supra*.[139]

B. Plaintiffs' Factual Allegations Regarding Coal-Laden Snow Contradict Sworn Testimony, Are Unsupported, and Fail to Provide a Basis for Their Claim.

Even if it were possible to maintain a Clean Water Act citizen suit claim regarding coal-laden snow despite the express terms of the General Permit, Plaintiffs fail to provide sufficient factual support for such a claim in their motion for summary judgment. As discussed above, in order to maintain a Clean Water Act citizen suit, a plaintiff must demonstrate "a state of either continuous or intermittent violation – that is, reasonable likelihood that a past polluter will continue to pollute in the future."[140] A plaintiff "must prove that ongoing violations actually

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[137] Plaintiffs cite to cases which hold that that bulldozers and backhoes may be point sources. Plfs' Brief at 44, n.95. Defendants do not dispute those holdings. Those cases, however, do not support the argument that use of a snow plow or other particular type of point source alters the makeup of snow so as to require a separate Clean Water Act permit where a NPDES stormwater permit is already in place. *See Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 261 F.3d 810 (9th Cir. 2001); *Avoyelles Sportsmen's League, Inc.*, 715 F.2d 897; *United States v. Tull*, 615 F. Supp. 610 (E.D. Va. 1983), *rev'd on other grounds*, 481 U.S. 412 (1987); *United States v. Weisman*, 489 F. Supp. 1331 (M.D. Fla. 1980); *Colvin v. United States*, 181 F.Supp.2d 1050 (C.D. Cal. 2001).

[138] *See* 33 U.S.C. §§ 1311 (prohibiting unpermitted or otherwise unauthorized discharges), 1342 (providing for permitting).

[139] *See* 33 U.S.C. § 1342(k).

[140] *Gwaltney of Smithfield Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 57 (1987); *Adams v. Teck Cominco Alaska, Inc.*, 414 F.Supp.2d 925, 935 (D. Alaska 2006).

have occurred."[141] It is insufficient to rely on proof of intermittent or sporadic violations where "there is *no real likelihood of repetition*."[142] Even if Plaintiffs could demonstrate that there was a continuing practice of plowing snow from the dock into the Bay, they could not meet their burden of establishing that such discharges are not covered by the General Permit.

However, Plaintiffs cannot even demonstrate that snow plowing from the dock into the Bay is an ongoing practice. Plaintiffs offer up the testimony of a single witness[143] to demonstrate that there is "ongoing" plowing of snow into Resurrection Bay or onto a pond and adjacent wetlands north of the coal stockpiles.[144] Yet, a review of this individual's testimony demonstrates that it is contradictory and/or fails to support Plaintiffs' allegations.

1. Plaintiffs' assumptions do not support their claim that coal-laden snow is plowed into the Bay, much less show the absence of an issue of fact.

Plaintiffs allege that snow contaminated by coal is plowed off the Seward Terminal dock.[145] Plaintiffs do not—and cannot—support that contention. Plaintiffs' lone fact witness on this issue stated in his deposition, "I see them plowing snow into the bay and I'm *just assuming* that there's coal in it, because *I assume* that the coal's falling on the – the dock like I've been told, too."[146] The witness further assumes there to be coal on the snow because he claims the

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[141] *Natural Res. Def. Council v. Sw. Marine, Inc.*, 236 F.3d 985, 998 (9th Cir. 2000).

[142] *Id.* (emphasis in original).

[143] Plaintiffs employ the term "citizens" suggesting multiple sources for this unfounded allegation. However, in truth, the *only* source for this assertion is this witness.

[144] Plfs' Brief at 44-45.

[145] *Id.* at 45.

[146] Mayberry Decl., Ex. E (Maddox Dep. 133:6-10) (emphasis added).

snow is not white.[147] Likewise, Plaintiffs assert that simply because coal may have fallen at times onto the Seward Terminal dock, "where there is snow on the dock…coal spillage and coal dust accumulates on the snow."[148] Plaintiffs' "assumptions" are not proof that there is in fact coal on the snow at any given time. Simply because coal was occasionally deposited on the dock does not mean that it has done so when there was snow – or on the occasion when snow was supposedly removed.[149]

Plaintiffs also point to the narrow space between slats in the loading dock and allege that snow containing coal must fall through those spaces.[150] Again, even if they had a legal basis for claiming that this stormwater discharge was not covered by the General Permit, Plaintiffs offer no support for their *assumption* that snow falling through the slats would have contained coal—or for the number of day(s) on which coal-covered snow was allegedly discharged. Moreover, the ARRC employee upon whom they rely to support this allegation did not, in fact, testify that coal fell between these slats. Rather, this witness explained why discolored snow on the dock may not necessarily contain coal.[151] Such assumptions are not evidence the Court may rely

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[147] *Id.* Plaintiffs' witness asserts that he can tell the color of the snow with his naked eye, yet he cannot capture a photo of the alleged snow plow machinery because it is too far away. *Id.* (Maddox Dep.) at 40:2-16. Even if one were to assume that snow on the dock was not white, any discoloration does not prove, without more, that there was coal on the snow. *See e.g.,* Stoltz Supp. Decl. ¶ 11 (discoloration of snow on the dock is from equipment and foot traffic); Mayberry Decl., Ex. G (Farnsworth Dep.) at 113:3-114:3 (same).

[148] *See* Plfs' Brief at 45.

[149] Stoltz Decl., ¶ 13 (noting that the loading dock is 10 feet away from the covered conveyor and that coal would not in the ordinary course fall on the majority of the loading dock and that when coal does fall on to the dock, employees pick up the coal and return it to the coal piles within the facility).

[150] Plfs' Br. at 29, 52 (citing Farnsworth Dep. at 113:3-114:6).

[151] *See* Mayberry Decl., Ex. G (Farnsworth Dep.) at 113:3-114:3 (testifying only that he had seen snow fall "through the dock" and that snow is at times "tracked up from equipment and people moving on it").

upon.[152] As this Court has stated, Plaintiffs must establish actual discharges to prevail in obtaining civil penalties.[153]

2. Plaintiffs' witness's declaration regarding ongoing discharges of coal-laden snow contradicts both his deposition testimony and other witnesses' testimony.

The Ninth Circuit has held that a plaintiff may not rely on "'sham' testimony that flatly contradicts earlier testimony in an attempt to 'create' an issue of fact and avoid summary judgment."[154] Plaintiffs attempt to do this very thing by offering—for purposes of establishing that snow has recently been plowed into Resurrection Bay in an attempt to defeat summary judgment—a witness declaration that directly contradicts that person's sworn deposition testimony. This Court should not give any weight to that declaration in its evaluation of whether the plowing of coal-laden snow from the dock to the Bay is ongoing.

Plaintiffs' witness now claims that "[i]n January, February, and March of 2012, I have also seen AES loaders on the dock push snow covered with coal-dust and coal spillage into piles on the dock, and then collect the snow in the loader bucket and dump it over the edge of the dock."[155] This statement directly contradicts the same witness's January 31, 2012 deposition testimony: when asked when he last saw snow being dumped directly off the Seward Terminal dock into Resurrection Bay, Mr. Maddox replied, "*Not this year. I haven't seen it this year.*

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[152] *See Allen v. Coughlin*, 64 F.3d 77, 80 (2d Cir. 1995) (holding that conclusory assertions in affidavits are generally insufficient evidence on summary judgment); *Compton v. Altavista Motors, Inc.*, 121 F.Supp.2d 932, 939 (W.D. Va. 2000) (holding that assumptions based on speculation and conjecture is not evidence sufficient for summary judgment).

[153] January 10, 2011 Court Order (Docket # 56) at 27.

[154] *Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262, 267 (9th Cir. 1991); *see also Radobenko v. Automated Equip. Corp.*, 520 F.2d 540, 544 (9th Cir. 1975).

[155] Maddox Decl., ¶ 33.

Probably November [2011]."[156] Plaintiffs' witness cannot be allowed to submit sham evidence that contradicts his prior testimony to support their own claim for summary judgment.[157]

Moreover, other evidence uniformly rejects Plaintiffs' factual allegations. In response to the assertion that snow is plowed into Resurrection Bay, the AES employee in charge of managing the day-to-day operations of the Seward Terminal facility explained that "[t]his allegation is false."[158] Since well before this litigation, AES had a policy of removing snow from the Seward Terminal dock and transporting it to another appropriate part of the facility where it is either absorbed into the ground or runs off through other permitted outfalls.[159] In addition, AES forbids its employees from dumping coal into Resurrection Bay by any means.[160] These policies are strictly enforced, and if any employee were to violate the policy it would be grounds for termination.[161] Based on these measures, there is no reasonable likelihood that Defendants will push snow, much less coal-laden snow, into Resurrection Bay.[162] The conclusory and completely unsubstantiated statements from Plaintiffs' sole witness, which contradict his deposition testimony, do not support their motion for summary judgment and cannot save their third claim from dismissal.

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[156] Mayberry Decl., Ex. E (Maddox Dep.) at 128:2-25 – 129:1-2 (emphasis added).

[157] *See Kennedy*, 952 F.2d at 266; *Radobenko*, 520 F.2d at 544.

[158] Stoltz Supp. Decl. ¶3.

[159] Declaration of Robert Brown ("Brown Decl.") (Docket # 113), ¶ 5. Such measures could be construed to be best management practices under the stormwater permit plan in directing snow runoff to areas such as settlement ponds. This policy is further emphasized by AES's Policy on Coal Entering the Water, which establishes zero tolerance for any intentional dumping, shoveling or knocking coal into the water. Ashbaugh Decl., Ex. AA. In addition, AES has instituted measures to minimize spillage onto the loading dock, for example by replacing scrapers on the conveyor system and shiploader and modifying chutes at appropriate locations. *See* Stoltz Decl., ¶¶ 9-13.

[160] Ashbaugh Decl., Ex. AA.

[161] Brown Decl., ¶ 5.

[162] *Id.*

3. Plaintiffs' claim that snow is removed from the Seward Terminal and placed in areas outside the facility boundaries is unsupported.

Finally, Plaintiffs' claim that Defendants plow coal-laden snow from the Seward Terminal property onto a pond and adjacent wetlands outside the facility, specifically in the area north of the coal stockpiles or the intertidal zone near Resurrection Bay, is not supported.

Plaintiffs' sole witness for this issue asserts in his declaration that he took photographs of snow piles on the pond north of the Seward Terminal that originated from the facility and are now located outside the facility on other ARRC land.[163] Plaintiffs' witness made the following statement in his deposition that contradicts what he now states in his declaration: "What I've *never* seen is them scooping it up and taking it off the dock and putting it somewhere away from the water [Resurrection Bay]."[164] Under Ninth Circuit law discussed above, a sham declaration proffered into evidence in summary judgment proceedings that contradicts previous sworn testimony cannot be used to defeat (or support) summary judgment,[165] and even if this Court could consider these statements by Plaintiffs' witness, they have no other factual support. A picture of snow at a site outside of Seward Terminal property, without any evidence regarding where the snow came from or who put it there, does not establish any wrongdoing by Defendants. Further, Defendants' witnesses testified in their declarations that they have *never* taken snow from the Seward Terminal and deposited it on areas outside the Seward Terminal

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[163] Maddox Decl., ¶ 26.

[164] Mayberry Decl., Ex. E (Maddox Dep.) at 128:10-13 (emphasis added). The witness makes a conclusory statement in his current declaration that ARRC uses this pond as a common storage spot for snow piles for the coal stockpile area. Maddox. Decl., ¶ 26. This statement has no evidentiary support and is false. ARRC does not plow any snow located on the Seward Terminal property. Supplemental Declaration of Paul Farnsworth in Opposition to Plaintiffs' Motion for Summary Judgment ("Farnsworth Supp. Decl."), ¶ 3. Any snow plow activity that is conducted at the Seward Terminal is conducted by AES employees who have never plowed snow from the facility to the pond north of the coal stockpiles or onto the intertidal zone near Resurrection Bay. Stoltz Supp. Decl., ¶ 2.

[165] *Kennedy*, 952 F.2d at 267.

property.[166] As the Seward Terminal is the only facility that is the subject of this lawsuit, absent any evidence that the snow at locations outside of the facility's property originated from the Seward Terminal, Plaintiffs have no cause of action.

Moreover, this Court should give no credence to Plaintiffs' witness's newly-devised conclusory claims in his declaration that Defendants scoop snow covered with coal dust from their facility and take it outside the Seward Terminal.[167] This statement directly contradicts the witness's sworn deposition testimony that he has not seen snow plowed onto such locations but that he only sees what he claims to be "the result."[168] As noted above, sham declarations that contradict prior sworn testimony are not evidence that can be used to as evidence to defeat (or support) summary judgment.[169] Even if such declarations could be considered, Plaintiffs' proffered photograph of snow outside the Seward Terminal property does not prove where the snow came from or who put it there, and this does not establish any wrongdoing by Defendants. Because Plaintiffs' claims with respect to coal-laden snow are not factually supportable, Plaintiffs are not entitled to summary judgment on this claim.

IV. EVEN ACCEPTING THEIR NOVEL THEORIES OF LIABILITY, PLAINTIFFS WOULD NOT BE ENTITLED TO SUMMARY JUDGMENT BECAUSE THEY HAVE NOT PROVEN VIOLATIONS.

Even if Plaintiffs were not legally barred from challenging Defendants' alleged coal discharges into the Bay (see Sections I-III, *supra*), Plaintiffs fail to carry their burden of proof with respect to discharges on individual days. This Court's January 10, 2011 opinion requires that "any civil penalties must be based on actual discharges, not the mere failure to obtain a permit."[170] Accordingly, Plaintiffs must prove that an unpermitted discharge occurred on a

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[166] Stoltz Supp. Decl., ¶ 2; Farnsworth Supp. Decl., ¶¶ 2-3.

[167] Maddox Decl., ¶¶ 25, 33.

[168] Mayberry Decl., Ex. E (Maddox Dep.) at 38:17-25 – 39:1.

[169] *See Kennedy*, 952 F.2d at 267.

[170] January 10, 2011 Court Order (Docket # 56) at 27.

specific date. For all three of their claims, Plaintiffs have either failed to provide such proof or have presented disputed evidence. Plaintiffs consequently are not entitled to summary judgment.

A. Record Evidence Does Not Support the Claimed Violations from Coal Sediment Discharges Even Under Plaintiffs' Theory of Clean Water Act Liability.

Even if coal sediment discharges from the conveyor and shiploader were not covered under the General Permit,[171] Plaintiffs cannot prove that coal sediment continues to fall from the conveyor and shiploader into Resurrection Bay. Plaintiffs' claims rely on unsupported inferences and assumptions, unsubstantiated allegations and mischaracterized testimony.[172] Foremost among the deficiencies in Plaintiffs' factual allegations, however, is their failure to prove even a single day of violation, as is required for the imposition of liability in this case.[173] Plaintiffs summarily conclude that "every time a ship loads coal, coal falls into Resurrection Bay."[174] Upon this unsubstantiated assumption, Plaintiffs claim that Defendants have discharged coal into the Bay on each of 315 days of shiploading between 2005 and 2010.[175] Plaintiffs' premise that each day of shiploading is necessarily a day of violation is false, as coal sediment

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[171] *See generally* Section I, *supra*.

[172] *See, e.g.*, Plfs' Brief at 14 (citing Stoltz Dep. at 124:6-25, 125:1-5; Brown Dep. at 166:1-8). The testimony cited does not support Plaintiffs' contentions that coal spills from the ship loader into the Bay and that Mr. Stoltz "possibly" saw this in 2011. *See* Mayberry Decl., Ex. H (Brown Dep.) at 166:4-8 (Q: When loading a ship, have you ever seen coal fall into Resurrection Bay? A: Yes. Q: When? A: I don't know. It's been a while. I don't know."); *Id.*, Ex. C (Stoltz Dep.) at 124:11-15 (Q: Have you seen coal fall from the ship loader onto the ***dock*** in 2012? A: No. Q: How about in 2011? A: Possibly.) (emphasis added). Further, when asked how many times and when he had seen coal fall from the ship loader into the Bay, Mr. Stoltz replied, "I don't know. A few [times] . . . . more so I would say prior to the upgrade that was completed on the ship loader, I believe in '09." *Id.*, Ex. C (Stoltz Dep.) at 124:23-125:5.

[173] January 10, 2011 Court Order (Docket # 56) at 27.

[174] Plfs' Brief at 30.

[175] *Id.* at 30-31.

has not entered and does not enter the Bay each time a ship is loaded.[176] Even setting aside the many other deficiencies in Plaintiffs' first claim, Plaintiffs are not entitled to summary judgment because Plaintiffs cannot identify a single day on which an unpermitted discharge of coal sediment has occurred.

B. Record Evidence Does Not Demonstrate Days on which Wind-Borne Dust Reached Waters of the United States, Even Accepting Plaintiffs' View That Such Emissions Require a Permit.

Setting aside the myriad reasons why wind-borne dust emissions cannot be grounds for this or any other Clean Water Act citizens' suit,[177] Plaintiffs have failed to prove, as they must,[178] that dust from Seward Terminal actually entered Resurrection Bay on any particular day. Plaintiffs therefore would not be entitled to summary judgment on their second claim even if their factual allegations had a legal basis.

First, the majority of Plaintiffs' allegations regarding wind-borne dust emissions rely solely upon the reports—both first- and second-hand— and amateur photography of Plaintiffs' primary witness, Russell Maddox. Discovery has revealed those reports and photographs to be, at a minimum, speculative and unreliable. The witness admits that when he reports alleged dust occurrences to the regulatory authorities, they typically determine either that the witness's

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[176] *See* Supp. Stoltz Decl. at ¶ 9 ("This is not true. While, on occasion, coal fell into Resurrection Bay during shiploading, this did not happen every day when a ship was loaded."). Furthermore, Mr. Stoltz does not know, and AES has no records which would determine, which if any days coal sediment has fallen to the Bay. *Id*. at ¶ 10 ("I am uncertain as to when coal may have fallen from the conveyor into the bay during loading. Since this is a permitted discharge, AES did not keep a record of such events.").

[177] *See generally* Section II, *supra*.

[178] January 10, 2011 Court Order (Docket # 56) at 13; *see also, e.g., Envtl. Prot. Info. Ctr. v. Pac. Lumber Co.*, 469 F. Supp. 2d 803, 827 (N.D. Cal. 2007) (quoting *Waterkeeper Alliance, Inc.*, 399 F.3d at 505).

observations are not corroborated or that Defendants have not violated the law.[179] The witness further admits that he is untrained and not certified to carry out EPA observational protocols for determining whether alleged plumes are coal dust as opposed to steam or smoke;[180] and that he has never tested material on snow or other surfaces to determine whether it is coal dust, as opposed to dark soil, silt, "graywacke," or other material.[181] A subset of the witness's reports, in addition to lacking foundation, is secondhand and therefore constitutes inadmissible hearsay.[182] Because of their inherent unreliability, such reports cannot serve as proof that dust was deposited in the Bay on the listed days.[183] Appendix A catalogues Plaintiffs' allegations that are based upon these faulty reports.

Similarly, the photographs taken by Plaintiffs' primary witness and others do not prove that wind-borne coal dust entered Resurrection Bay. Photographs by untrained, amateur observers purporting to document dust in the air do not prove whether the material depicted is

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[179] *See* Mayberry Decl., Ex. E (Maddox Dep.) at 140:25-142:25 (DEC and EPA have not determined any violations based on any of Mr. Maddox's reports since the NOVs).

[180] *Id*., Ex. E (Maddox Dep.) at 57:4-58:4 (Maddox has no formal Method 22 training in making visual determinations of dust); *see also id*. at 51:6-9 ("Q: Well, in – in fact, you yourself believe it's sometimes difficult to tell [whether a plume is dust, steam, or smoke], isn't that right? A: Sure. Yes."); *id.*, Ex. I (Ex. 4 of Maddox Dep.) (Apr. 23, 2010 email from Mr. Maddox to Bretwood Higman) ("Its [sic] just so hard to tell smoke, steam, and dust apart.").

[181] *Id*., Ex. E (Maddox Dep.) at 59:20-61:3 (Mr. Maddox does not do any chemical analysis to determine whether material on snow is coal or greywacke; he only "offer[s DEC his] opinion and [his] observation, and the rest is left up to the experts."); *id*. at 124:21-125:5 (Mr. Maddox has never tested material alleged on boats or alleged in the Bay to determine whether it was coal dust); *see also id.*, Ex. J (Klafka Dep.) at 26:1-22 (photos alleged to depict coal dust could, in fact, be other dust, greywacke, or glacial silt); *id*. at 29:19-30:3 (admitting "[i]t's possible" that alleged dust in the water could be greywacke, glacial silt, or dust carried by boats).

[182] *See, e.g.*, Plfs' Brief at 40 (citing Plfs' Ex. 74); *id* at 42 (describing three reports Mr. Maddox received regarding alleged dust releases).

[183] *See, Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ("Credibility determinations… are jury functions, not those of a judge… ruling on a motion for summary judgment…").

coal dust, where it travelled, or when, if ever, it was discharged into the Bay.[184] Furthermore, photographs of a material on a surface do not prove any particular day(s) of violation; they merely document the presence of some substance, coal dust or otherwise, on a surface at some moment time.[185] Examples of allegations based solely on such photographs are enumerated in Appendix A.

In addition, Plaintiffs repeatedly misstate or mischaracterize testimony and facts relating to wind-borne dust; these statements do not support Plaintiffs' propositions and do not prove that dust entered the Bay. For instance, Plaintiffs claim that "AES acknowledges that coal dust from the shiploader is discharged into the Bay."[186] But AES admitted only that dust "may or may not have been deposited on one or more of the locations" named by Plaintiffs, which include many land-based destinations.[187] Appendix A provides specific examples of Plaintiffs mischaracterizing evidence and Defendants' statements.

Finally, Plaintiffs rely heavily on inferences and assumptions, while failing to prove that coal dust actually entered the Bay on specific days. For example, Plaintiffs assume that dust was deposited in the Bay whenever Defendants shut down their shiploading and train unloading operations due to dust.[188] However, the mere existence of a dust release does not demonstrate

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[184] *See generally, e.g.*, Mayberry Decl., Ex. E (Maddox. Dep.) at 148:5-12 (agreeing that various circumstances affect whether dust actually falls to the Bay); *id*., Ex. J (Klafka Dep.) at 95:11-18, 104:4-15, 105:11-15 (whether and how far dust will travel depends on various conditions, including "condition of the coal, level of activity, and weather conditions[,], and expert "can[not precisely" determine how far dust would travel without sufficient information on all factors).

[185] *See, id*. As also noted above, Mr. Maddox admits that he does not test to see if the dust he observes is, in fact, coal. *See* n. 184, *supra*.

[186] *See, e.g.*, Plfs' Brief at 37.

[187] Answer (Docket # 15), ¶ 41; Compl. (Docket # 1), ¶ 41.

[188] *See* Plfs' Brief at 38, and exhibits cited (exhibits cited provide no indication that dust ever entered the Bay); *id*. (citing Ex. 67) (exhibit cited for train unloading stop on Jan. 12, 2008 documents only that operations were stopped due to dust and that winds were "blowing towards town[,]" *i.e.*, toward land); *id.* at 41 (citing Exs. 75-78, 80).

that it drifted from the facility and into Resurrection Bay.[189] As above, other instances of Plaintiffs' unsupported assumptions are set forth in Appendix A.

In short, each of Plaintiffs' allegations regarding deposition of coal dust in Resurrection Bay is clouded in doubt—whether through unfounded assumptions, distortions, or demonstrated unreliability of the evidentiary source. Even if this Court overlooked the grave legal barriers to Plaintiffs' second claim, none of the evidence they proffer rises to the level of proof required to prevail on a motion for summary judgment.

C. Plaintiffs Have No Facts to Substantiate Claims that Coal-Laden Snow Has Been Discharged Improperly.

Even if Plaintiffs had some legal basis for their allegations that coal-contaminated snow from the Seward Terminal is plowed into Resurrection Bay or other waters,[190] Plaintiffs have not proven even the most basic facts necessary to support them. In fact, Plaintiffs' brief fails to identify even a single day of violation. Because Plaintiffs have not alleged any date on which the facility improperly disposed of snow, they are not entitled to summary judgment on their third claim.[191]

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[189] *See* n. 187, *supra*.

[190] *See* Section III, *supra*.

[191] *See* January 10, 2011 Court Order (Docket # 56) at 27. Plaintiffs' only possible source for their contrary allegation is a solitary, untrained witness, who claims to have seen employees dispose of snow over the dock and who *assumes* that snow plowed from the dock must contain coal, merely because it is not white. *See* Section III(B), *supra*. This witness's unsupported accusations and assumptions are not only insufficient basis for granting summary judgment, but contradict his earlier sworn testimony and lack even an ounce of credibility. *Id.*

Conclusion

For the reasons set forth, the Court should deny Plaintiffs' motion for summary judgment.

DATED at Anchorage, Alaska this 11th day of June 2012.

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CERTIFICATE OF SERVICE

I certify that on this 11th day of June, 2012, a true and correct copy of the foregoing was served electronically upon the following:

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